IN THE

Supreme Court of the United States

NO. 81

OCTOBER TERM, 1961

THOMAS N. GRIGGS, Petitioner,

v.

COUNTY OF ALLEGHENY

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR PETITIONER AND APPENDICES

WILLIAM A. BLAIR
DAVID B. FAWCETT
D. MALCOLM ANDERSON
Attorneys for Petitioner

1707 Henry W. Oliver Building
Pittsburgh 22, Pennsylvania

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

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OPINIONS OF THE COURTS BELOW

The majority and dissenting opinions of the Supreme Court of Pennsylvania are reported at 402 Pa. pp. 411 and 420, respectively, and appear in the Record at pages 80 and 88, respectively. The opinions of the Court of Common Pleas of Allegheny County, Pennsylvania, are reported at 108 P.L.J. 65, and appear in the Record beginning at page 58; the Report of the Board of Viewers (unreported) appears in the Record beginning at page 28.

JURISDICTION

The decision of the Pennsylvania Court sought to be reviewed was entered January 16, 1961. The order denying Reargument was entered February 15, 1961.

The jurisdiction of your Honorable Court is invoked under Title 28 U.S.C., Section 1257 (2) and (3).

QUESTIONS INVOLVED

1. Whether there was an unconstitutional "taking" by the County of Allegheny of the airspace above petitioner's property situate in the approach zone or path of glide where the pattern of flight established by the Civil Aeronautics Board for aircraft landing at and departing from the Greater Pittsburgh Airport, a major public airport owned and operated by the County, requires aircraft regularly and frequently to fly at low altitudes over petitioner's property thereby depriving him of his use and enjoyment thereof?

2. Whether the remedy suggested by the Pennsylvania Supreme Court, that is, tort actions against airlines and pilots, is illusory and impossible of enforcement and therefore lacking in due process?

3. Whether that decision, which, if followed, would subject airlines and pilots to actions for damages and possible injunctive proceedings though operating their aircraft in full compliance with the rules and regulations of the Civil Aeronautics Board, would be an attempt by the State to regulate in a field occupied exclusively by the Federal Government and be in conflict with the Federal Acts dealing with air commerce and the commerce clause of the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The applicable provisions of Article 1, Section 8, Clause 3, of the Constitution of the United States, the Fifth and Fourteenth Amendments thereto and the applicable provisions of the federal acts governing air commerce are reproduced in Appendix A herein. The applicable provisions of Article 16, Section 8 of the Pennsylvania Constitution and the applicable provisions of the Pennsylvania statutes are reproduced in Appendix B herein.

STATEMENT OF THE CASE

The Greater Pittsburgh Airport is a public improvement constructed and maintained by the County of Allegheny (a political subdivision of the Commonwealth of Pennsylvania) to provide airport and air transport facilities for the use of the general public and is one of the major facilities of the commercial and civilian transportation system of the United States and is a major instrumentality in the commerce and postal system. (R. 5-6)

Prior to 1952 the County acquired land in Moon and Findlay Townships, in the western portion of the County, and proceeded to the erection of the Greater Pittsburgh Airport and air transport facilities for the use of the general public in conformity with the rules and regulations of the Civil Aeronautics Administration within the scope of the "National Airport Plan" as provided for in the Federal Airport Act, 49 U.S.C.A. 1101. (R. 31)

In compliance with those rules, the County laid out and submitted for approval a Master Plan of the airport which included the "approach areas" and the Master Plan was duly approved by the Civil Aeronautics Administration. (R. 32)

The County entered into certain agreements with the Administrator of Civil Aeronautics with respect to the operation of said airport and particularly with regard to the approach standards required for safe operation. Among those agreements were several so-called Grant Agreements wherein the County as "Sponsor" received substantial funds from the United States Government pursuant to the provisions of the Federal Airport Act, supra. The Grant Agreements provided, among other things, that the County would adopt a zoning ordinance and acquire easements in land or airspace within or without the boundaries of the airport where necessary for the safe operation of aircraft in and out of the airport. (R. 32)

The property, subject of this litigation, is located in the approach area to the Northeast runway approximately 3,250 feet from the end of the runway at the airport. The portion of the petitioner's property within said Northeast approach area is situate on a hill and contains a residence, garage, stone cottage, tennis courts and elaborate landscaping, and 6.1 acres of land, more or less. (R. 33)

The approved and established standards for the approach area for the Northeast runway provided for a center line extended 10,000 feet beyond the "clear zone" at the end of the runway with gradient of 1 on 40 having a splayed slope surface with lateral width ex-

tended uniformly from 500 feet at the end of the runway to 2,500 feet at the end of the center line projected 10,000 feet therefrom. (R. 32)

The elevation at the end of the Northeast runway is 1150.50 feet above sea level; the door sill at petitioner's residence (which is on a hill) 1183.64 feet; the top of the chimney 1219.64 feet. The slope gradient of the approach area is as 40 is to 3250 feet (the distance of petitioner's house from the end of the runway) or 81 feet, thus leaving a clearance of 11.36 feet between the bottom of the glide angle and the chimney of the petitioner's residence.

The Greater Pittsburgh Airport was opened for public use on June 1, 1952, as provided for by resolution of the Commissioners of Allegheny County. Since that time the airport has been used by all commercial aircraft serving Pittsburgh and Allegheny County. Prior to that date the County had entered into leasehold agreements conforming to the rules and regulations of the Civil Aeronautics Authority with several commercial airlines to use the Greater Pittsburgh Airport, granting to them, inter alia, the right to land and take off at said airport. (R. 33)

Since the opening of the airport, the Northeast runway with its approach area has been in regular operational use for landing and taking-off of commercial and other aircraft in regular flight patterns at heights near and over petitioner's residence from take-off being from 30 to 300 feet and on letdown from 53 feet to 153 feet. (R. 33)

The flights are therefore below the safe navigable airspace of 500 feet as prescribed in "Minimum Safe

Altitudes", Regulation 60.17 of the Civil Aeronautics Board. (Appendix A)

The low flight of aircraft over petitioner's property interfered with his existing use and enjoyment thereof. The interference resulted from the noise, disturbances and vibrations created by such airplanes as well as the fear for personal safety caused by the low flights in close proximity to the petitioner's residence; said noise of planes over petitioner's property on let-down to the Northeast runway being comparable to that of a noisy factory, and on take-off to the noise of a riveting machine or steam hammer. (R. 33)

The low altitude flights over petitioner's property caused the petitioner and occupants of his property to become nervous and distraught, eventually causing their removal therefrom as undesirable and unbearable for their residential use (R. 33-34)

The Dissenting Opinion relates the effect of the low flights in this manner:

> "Regular and almost continuous daily flights, often several minutes apart, have been made by a number of airlines directly over and very, very close to plaintiff's residence. During these flights it was often impossible for people in the house to converse or to talk on the telephone. The plaintiff and the members of his household, (depending on the flight which in turn sometimes depended on the wind) were frequently unable to sleep even with ear plugs and sleeping pills; they would frequently be awakened by the flight and the noise of the planes; the windows of their home would frequently rattle and at times plaster fell down

> from the walls and ceilings; their health was affected and impaired, and they sometimes were compelled to sleep elsewhere. Moreover, their house was so close to the runways or path of glide that as the spokesman for the members of the Airlines Pilot Association admitted 'If we had engine failure we would have no course but to plow into your house.' Moreover, the flights were endangered by plaintiff's trees and vice versa. . . ." (R. 89-90)

Several months after the opening of the airport, petitioner and other property owners similarly situated discussed the matter of the impact on them and their property with representatives of the County and commercial airlines in an effort to secure some relief from the conditions, but all disclaimed responsibility. The petitioner and other property owners thereafter filed actions in equity in the Court of Common Pleas of Allegheny County against the County and the several airlines in an effort to have that Court determine (1) whether there had been a "taking" of the property by the County as owner and operator of the Airport and the property owners being entitled to compensation therefor, or (2) whether the low flights were repeated trespasses for which the airlines were solely liable and for which injunctive relief would be granted. After much delay caused by preliminary objections raised by the County and airlines, followed by appeal to the Supreme Court of Pennsylvania, the latter Court finally ruled that equity could not determine on the pleadings that there was a "taking". *Gardner v. Allegheny County et al.*, 328 Pa. 88, 393 Pa. 120. This is the proceeding to which Mr. Justice Bell refers in his Dissenting Opinion. (R. 88)

Based upon the answers eventually filed by the County and airlines in the equity proceedings, wherein both declared that the low flights were necessary to get in and out of the airport and were in compliance with the rules and regulations of the Civil Aeronautics Board, the petitioner filed in the Court of Common Pleas of Allegheny County a Petition for Appointment of Viewers under the condemnation statutes of the Commonwealth of Pennsylvania to declare a taking by the County and to award damages therefor, and this litigation is the result of such proceeding. (R. 1, et seq.) Action on similar petitions by other property owners has been stayed pending the final determination of this case.

Pursuant to the procedure in such case, the Viewers conducted a view of the property and thereafter held a hearing at which various exhibits, including the Master Plan of the Greater Pittsburgh Airport, were introduced and testimony of petitioner and his witnesses was taken. The County presented no testimony and there is no issue of fact to be determined.

For the first time the information with respect to Master Plan and agreements with the federal government and the airlines as set out herein were made available to the petitioner at the hearing before the Board of Viewers.

The Viewers thereafter filed their Report with the Court of Common Pleas of Allegheny County, as provided by statute, in which they found that by reason of the burden imposed on petitioner's property by the necessary low flights, there was a "taking" by the County of a superterranean easement over petitioner's property effective 12.01 a.m. on June 1, 1952, the date the County

Commissioners had by resolution designated the opening of the airport for public use. The Viewers found the facts substantially as related above and held that the petitioner's property had been damaged and made an award of compensation to him. (R. 37)

The Court of Common Pleas of Allegheny County in due course dismissed all exceptions and sustained the Viewers' Report and Award.

On appeal to the Pennsylvania Supreme Court the Majority Opinion of that Court rejected the County's contention that such low flights were within the navigable airspace but denied that there was a "taking" by the County and vacated the Viewers' Report and Award.

While conceding, as the undisputed testimony disclosed, that petitioner's property had been damaged, it held that the petitioner's action for relief under the facts would seem to be against the owners and/or pilots of the aircraft under the provisions of Section 403 of the Pennsylvania Aeronautical Code of May 25, 1933, P.L. 1001, 2 P.S. 1469, which reads in part as follows:

> "The owner and the pilot, or either of them, of every aircraft which is operated over the lands or waters of this Commonwealth, shall be liable for damages to persons or property on or over the land or water beneath, caused by the ascent, descent, or flight of aircraft, or the dropping or falling of any object therefrom in accordance with the rules of law applicable to torts on land in this Commonwealth."

Mr. Justice Bell (now Mr. Chief Justice Bell) filed a Dissenting Opinion, joined in by Mr. Justice Eagen, (R. 88) in which he held that the principles enunciated in

United States v. Causby, 328 U.S. 256, are applicable to the facts in this case and consequently there was a "taking" of petitioner's property by the County; that the County knew the approaches or path of glide were regulated by the Civil Aeronautics Authority; that the regulations made it necessary for aircraft to fly low over petitioner's property in landing and taking off at the airport; that the approach area to an airport is analogous to an approach to a bridge or subway; that the need for easements in airspace in the approach areas was within the contemplation of the County and the Civil Aeronautics Board in that the County, in consideration of the advance of funds by the federal government, agreed with the Civil Aeronautics Board, inter alia, to acquire such needed air easements; that the remedy prescribed by the majority is illusory and will not result in just compensation to the petitioner. His opinion discusses most of the facts adduced before the Board of Viewers and, we believe, correctly states the applicable law.

Petitioner filed petition for reargument with the Pennsylvania Supreme Court but reargument was refused on February 15, 1961. The matter now comes before your Honorable Court on Certiorari to the Supreme Court of Pennsylvania granted by your Honorable Court on June 5, 1961.

SUMMARY OF ARGUMENT

I. Fifth and Fourteenth Amendments

The Pennsylvania Supreme Court has ruled that a political subdivision of the state which erected, owns and operates a major public airport is not liable for a taking of the airspace above private property situate in an approach zone in close proximity to the airport and subject to regular and frequent flights of aircraft at necessarily low altitudes and under the direction of federal aviation authorities as as result of which burden the property owner's use and enjoyment of the property has been destroyed. This holding by the Pennsylvania Supreme Court is contrary to the decision of your Honorable Court in *United States v. Causby*, 328 U.S. 256, and is in violation of the Fifth Amendment and Fourteenth Amendment to the Constitution of the United States and Article 16, Section 8 of the Constitution of Pennsylvania in that private property has been taken for public use without just compensation to the owner.

II. Due Process Clause

The relief suggested by the Pennsylvania Supreme Court is procedure against the airlines under a section of the Pennsylvania Aeronautical Code (1933) which is applicable only to damages caused by accident or negligence and not to damages caused in the regular flight of aircraft. Actions against airlines, whether under that statute or in the ordinary form of trespass, could not be successfully prosecuted because of the impossibility of determining and allocating the damages among the individual airlines serving the airport. The proof required to fix each airline's liability is impossible of attainment

by reason of the character of air transportation. The Pennsylvania Supreme Court has not provided a remedy which would enable the landowner to recover just compensation for his damages and he has therefore been deprived of his property without due process of law.

III. Conflict with Federal Control of Air Commerce

Under the decision of the Pennsylvania Supreme Court, the landowner, being unable to recover damages from the airlines in the procedure which it suggests, would be entitled to bring injunctive actions against the individual airlines to restrain the repeated trespasses or low flights over his property. Such injunctive relief, if granted, would result in interruption of air traffic to and from the major public airport on such days as the particular approach zone for safety reasons was required to be used. Since federal control of air commerce is exclusive, *Northwest Airlines v. Minnesota,* 322 U.S. 292, injunctions issued by a state court would appear to be in conflict with the federal air commerce acts as well as the commerce clause of the United States Constitution on which such acts are bottomed.

ARGUMENT

I.

There Was a "Taking" of Petitioner's Property Under Authority of United States v. Causby, 328 U.S. 256, for Which Petitioner Is Entitled to Just Compensation Under the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 16, Section 8, of the Constitution of the Commonwealth of Pennsylvania.

This case concerns damages to petitioner's real property caused as a direct result of the operation of the Greater Pittsburgh Airport and the flight of aircraft into and out of it. The Supreme Court of Pennsylvania says there was no "taking" by the County as owner and operator of the airport but indicates that petitioner's rights are against the airlines in tort actions under a section of the Pennsylvania Aeronautical Code, later to be discussed herein.

In *United States v. Causby,* 328 U.S. 256, your Honorable Court decided that the low flight of military planes landing at and taking off at an airport leased by the United States, constituted a "taking" within the Fifth Amendment for which the United States was liable. You said at pages 264 and 265:

> "As we have said, the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. * * * The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself and we think that the

landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface."

Again, at pages 266, 267:

"Flights over private land are not a taking, unless they are so low and frequent as to be a direct and immediate interference with the enjoyment and use of the land. We need not speculate on that phase of the present case. For the findings of fact of the Court of Claims plainly establish that there was a diminution in value of the property and that the frequent, low level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land."

Insofar as petitioner knows, no other case involving taking by flights of aircraft has been before your Honorable Court, but the principles it established have been followed by the Federal Courts in many cases, including: *Highland Park, Inc. v. United States,* 161 F. Supp. 597; *Freeman v. United States,* 167 F. Supp. 541; *Cravens v. United States,* 163 F. Supp. 309; *Adaman Mutual Water Company v. United States Court of Claims,* decided October 8, 1958; *Ralph Dick et al. v. United States,* 169 F. Supp. 491; *Hopkins v. United States,* 173 F. Supp. 245 (Advanced report—July 13, 1959); and *United States v. Ashcraft et al.,* 176 F. Supp. 447.

Under the authority of the Causby case, the Supreme Court of Washington, in the case of *Ackerman v. Port of Seattle,* 348 P.2d 664, decided that the Port of Seattle was liable for the taking of Ackerman's property by the necessary flights of commercial planes in landing and taking off at the Seattle airport. It is to

be noted that the provisions of the Washington Constitution are identical to those of Pennsylvania, and both, of course, are similar to the applicable provisions of the Federal Constitution.

With the exception of the operation of the airplanes, all the elements which your Honorable Court in the Causby case, supra, held to constitute a "taking" of private property are present here — the petitioner's property is located in close proximity to the airport; it is situate in the prescribed "approach area" or path of glide which must be followed by aircraft landing at and departing from the airport; the flights are regular and frequent and at such necessarily low altitudes over petitioner's property (lower than in Causby) as actually to destroy petitioner's use and enjoyment of the property and to greatly depreciate it in value.

In Causby, supra, the United States operated both the airport and the aircraft; therefore, the determination as to whether there was a "taking" of petitioner's property by the County when the Greater Pittsburgh Airport was opened for public use depends upon the obligations assumed by the County when it undertook to construct and operate the airport for public use.

The Majority Opinion of the Supreme Court of Pennsylvania holds that, solely for the reason that the County does not control the operation of the aircraft, there is no taking by the County. While it acknowledges that the airport was constructed according to a "Master Plan" submitted to the Civil Aeronautics Board for approval, it appears to assume that such procedure was more or less of a perfunctory or routine nature.

Argument.

As illustrative of the Majority Opinion's failure to appreciate the significance of the requirements for a Master Plan is its following comment:

> "... But the drafting, submission, and approval of the plan did not give the County an easement of avigation over Griggs' property, nor was any evidence offered to show that such action deprived Griggs of any use and enjoyment of his property, substantially or otherwise." (R. 86)

It is true that these factors did not "give" the County an air easement but the contention specifically is that by reason thereof the County "took", or appropriated, such air easement without following the lawful method provided by the Pennsylvania statutes for the acquisition thereof. Further, the statement that the action did not deprive petitioner of any use or enjoyment of the property is rather difficult to understand in view of the positive record of damage made before the Board of Viewers and the findings of that Board as set out on pages 33 and 34 of the Record and which findings are not in dispute.

The County, fully realizing that air commerce is within the exclusive control of the federal government by reason of the Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938 (now the Federal Aviation Act), proceeded to erect an airport in conformance with the National Airport Plan as provided for in the Federal Airport Act, 49 U.S.C.A. 1101. That act recognizes that "airport development" does include "any acquisition of land or of interest therein or of any easement through or in airspace which is necessary to permit any such work or to remove or mitigate or prevent or limit the

establishment of airport hazards." 49 U.S.C.A. 1101 (A 3).

The County, as Sponsor, being a public agency within the meaning of the Act, applied to the Administrator of the Civil Aeronautics Board for the grant of funds in connection with the development of the airport as provided in said Act.

Not only was it required under the Act and in the agreements which it entered into with the Administrator to provide proper and safe approach areas to the several runways at the airport, but in the Grant Agreements executed by it and the Administrator for the United States Government it specially agreed that:

> "(i) Insofar as is within its powers and reasonably possible, the Sponsor will prevent the use of any land *either within or outside the boundaries of the Airport* in any manner (* * *) which would create a hazard to the landing, taking-off or maneuvering of aircraft at the Airport, or otherwise limit the usefulness of the Airport. This objective will be accomplished either by the adoption and enforcement of a zoning ordinance and regulations *or by the acquisition of easements or other interests in lands or airspace, or by both such methods.*" (Emphasis added) Paragraph 8 (i) of said Agreement (R. 104)

The Federal Airport Act specifically provides in 49 U.S.C.A. 1101, page 420:

> "If and when any such offer (of funds) is accepted in writing by the sponsor or sponsors to which it is made, such offer and acceptance shall comprise a grant agreement constituting *an obli-*

gation of the United States and of the sponsor or sponsors so accepting, . . ." (Emphasis added.)

Furthermore, the lease agreements with the several airlines provided that the airlines should have the privilege of landing at and taking off from the airport.

The Majority Opinion failed to consider the County's direct obligation as owner and operator of the airport, its agreements with the federal government under the Federal Airport Act, its agreements with the airlines that they can land at and take off from the airport. It likewise ignored the specific provisions of the Airport Zoning Act of the Commonwealth of Pennsylvania of 1945, P. L. 237 (2 P. S. 1550), Section 5 and 14 (Appendix B), both of which contemplate specifically that where the zoning regulations are so onerous in their application to the structures or parcels of land as to constitute a taking in violation of the Constitution of the state or the Constitution of the United States, the public body, (the County), as owner of the airport, may acquire by purchase, grant or condemnation in the manner provided by law (under which a political subdivision is required to acquire) such air right avigation easement or other estate or interest in property as may be necessary to effect the purpose of the Act.

The matter of liability of the owner of the airport for the acquisition of necessary air avigation easements and the approaches to the airport was fully considered in *George Ackerman v. Port of Seattle,* supra. In that case the Port Authority owned and operated the airport as does the County here. The court makes an exhaustive analysis of the law applicable to the several phases that are also involved in this litigation and says at page 671:

". . . We must now take up the question of whether, under the facts alleged, the Port—which operates no planes—can be liable for the alleged taking. As we earlier noted, the liability of the Port in appellant's complaints is predicated on the Port's alleged failure to provide adequate facilities, necessitating the frequent low flights over the appellant's land (and thus, as we have seen, through the appellant's private airspace). Having the power to acquire an approach way by condemnation, the Port, allegedly, failed to exercise that power, with the result that the appellant's private airspace is allegedly being used as an approach way, without just compensation first having been paid to them. *Clearly, an adequate approach way is as necessary a part of an airport as is the ground on which the airstrip, itself, is constructed,* if the private airspace of adjacent landowners is not to be invaded by airplanes using the airport. The taking of an approach way is thus reasonably necessary to the maintenance and operation of the airstrip." (Emphasis added)

A clear cut statement of the liability of a municipality for the damage done to private property located in a glide path is contained in a Pennsylvania lower court decision, *Reynolds et ux. v. Wilson et al.*, 67 D. & C. 286, in which the Court says at page 291:

"Why should a municipality which owns an airport, or its lessee, be permitted to appropriate a glide path over the lands of the adjoining owner? If the municipal airport could not be reached by land without passing over the property of an adjoining owner no one would contend for a right of passage without compensation. The flight path

within a few feet of plaintiffs' dwelling appropriates something just as real and probably of more value than a right of way over the surface. The City of New Castle has the power to acquire land for a right of way over the surface through the power of eminent domain. It has the same power to condemn a right of way through the air. Why should it not do so?"

To the same effect, *Delta Air Lines Corp. v. Kersey*, 193 Ga. 862.

The *Harvard Law Review* of June 1961, Volume 74, No. 8, contains an article beginning on page 1581 dealing with "Airplane Noise". The writer discusses in detail the various aspects of airplane noise and with particular relation to the effect upon the landowners whose properties are near the airports. While the writer of the article does not attempt to supply a solution of the various problems mentioned in the article, he does make the following observation with regard to liability of an owner of an airport at page 1587:

". . . Although aircraft make noise during all stages of flight, only when they are flying at extremely low altitudes—usually during take-offs and landings—do they substantially interfere with the landowner's interests. While such low-level flight is admittedly essential to air travel, plane owners have no control over the location of landing fields. It may be unfair to penalize them for the airport owner's selection of a site which makes inevitable the annoyance of large numbers of residents. Casting the primary liability on the airport owner will give him a strong incentive to minimize the noise

problem. He controls not only the location of the field but also the runway layouts, which govern the general direction of the flight paths used for approach and departure; he is therefore most capable of averting the problems created by low-level flight. Further, the discretion initially to determine the size of the land area set aside for the airport and the power subsequently to purchase additional adjacent tracts provide the airport owner with one of the few effective solutions to the aviation noise problem."

Mr. Justice Bell (now Mr. Chief Justice Bell) supports the position of the Board of Viewers (R. 35) that an "approach" to an airport is analogous to an "approach" to a bridge. A bridge is useless without proper approaches and similarly the purposes of a public airport can only be accomplished by use of approaches which meet the requirements of safety in flight. An approach is therefore a part of the bridge and likewise an approach is a necessary part of an airport.

In addition, Mr. Justice Bell makes clear that by the terms of the contract with the federal government the duty and legal obligation to acquire land, buildings, easements and other interests in land and in airspace which, unless acquired, would create a hazard to the landing, take-off, paths of glide, descent paths and authorized flights of aircraft, or otherwise limit the safety, usefulness and adequacy of the airport was clearly and unquestionably that of the County of Allegheny. He summarizes as follows:

". . . It follows that the County is liable to the plaintiff (1) under and by virtue of the well and

settled Common Law principle of sic utere tue ut alienum non laedes, and (2) under the United States v. Causby case, and (3) by reason of the aforesaid contract which the County made and entered into with the United States of America." (R. 98)

Under the Air Traffic Rules of the Civil Aeronautics Board (Appendix A) the safe navigable airspace over noncongested areas is 500 feet. Had petitioner's property been located in other than the approach zone aircraft would have been required to maintain a minimum height of 500 feet over the property. Being situated in the approach zone, the flights varied from 30 to 300 feet.

It is respectfully submitted that since the County undertook to erect and operate a major public airport, it was required to acquire in the manner provided by law all property needed for that purpose including air easements or rights of way necessary to give safe access to the public improvement. In addition, it also entered into a written agreement with the federal government in which it agreed to acquire necessary air easements but failed to take the lawful steps available to it under the Pennsylvania statutes to effect such acquisition. We submit therefore that the action of the County amounted to an unconstitutional taking of petitioner's airspace immediately upon the opening of the Greater Pittsburgh Airport for public use and the County then became liable to the petitioner for the diminution in value of the property by reason of the servitude imposed upon it.

II.

The Decision of the Supreme Court of Pennsylvania Deprives Petitioner of His Property Without Due Process of Law Because (1) The Statute Under Which That Court Suggest Action Be Taken Against the Airlines Is Not Applicable to Normal Movement of Air Traffic, and (2) It Is Impossible to Determine and Apportion the Damages Among the Respective Airlines in Trespass Actions.

A. The Section of the Pennsylvania Statute Suggested by the Pennsylvania Supreme Court Does Not Authorize Action For Damages to Property Caused in the Regular Movement of Air Traffic.

The Majority Opinion's casual consideration of this case is apparent from its statement that the relief which petitioner claims under the authority of the Causby case *would seem* to be covered under Section 403 of the Aeronautical Code of May 25, 1933, P.L. 1001, P.S. § 1469, which provides, in part, as follows: (Emphasis added)

> "The owner and the pilot, or either of them, of every aircraft which is operated over the lands or waters of this Commonwealth, shall be liable for damages to persons or property on or over the land or water beneath, caused by the ascent, descent, or flight of aircraft, or the dropping or falling of any object therefrom, in accordance with the rules of law applicable to torts on land in this Commonwealth."

Argument.

A discussion of the history of this paragraph is contained in *Prentiss v. National Air Lines, Inc.*, 112 F. Supp. 306, at page 314. The litigation related to death actions resulting from the three airplane crashes at Elizabeth, New Jersey, in December, 1951, January, 1952, and February, 1952. Suits were brought under the authority of a similar statute enacted by the State of New Jersey. The airlines attacked the constitutionality of the Act on the ground that the absolute liability imposed on them by the Act was a deprivation of property without due process and that it imposed an undue burden on interstate commerce.

The notes to this decision recite that the Commissioners on Uniform State Laws promulgated a Uniform Aviation Liability Act in or around 1922, of which this section was a part. New Jersey enacted it in 1929; the Pennsylvania Legislature adopted it in 1929 under the title, "State Law for Aeronautics" which was later repealed and adopted as "The Aeronautics Code", (1933 May 25, P.L. 1101, Article 1 Section 101 et seq. 2 P.S. 1460-1486).

The Trial Court held that this section of the uniform statute was valid and the imposition of absolute liability was not a deprivation of due process. It disposed of the contention of alleged restraint on interstate commerce as follows:

"Defendants further attack the validity of these statutory provisions as an invalid restraint upon interstate commerce. The statutory provisions in question clearly show that:

"(1) They do not affect the actual movement of airplanes in interstate commerce.

"(2) They do not affect the average airplane, even financially, as would a tax.

"(3) They only affect an airplane owner financially *on the occurrence of an accident. Such an accident the defendant owners will certainly agree is not the ordinary result of air travel.* (Emphasis added)

* * * * * * *

"The few authorities cited by defendants as in their support are so dissimilar in fact as not to be analogous. Nor do the statutory provisions in question conflict with Congressional control of interstate commerce. *The field covered by them is entirely different from that covered by the Civil Aeronautics Act of 1938, 49 U.S.C.A. § 401* et seq." (Emphasis added)

The interpretation of this particular section later came for review before the Supreme Court of New Jersey in *Adler's Quality Bakery, Inc. v. Gasteria, Inc.*, 159 Atl. 2d 97. In that case Gasteria's plane collided with a television tower in North Bergen, New Jersey. Numerous claims were made by persons living or working in the immediate area of the tower and involved damage to real and personal property caused by precipitation to the earth of the debris. There were twenty-five claims joined in the one action. Gasteria, owner of the plane said the New Jersey statute was unconstitutional under the Fifth Amendment and the commerce clause. The New Jersey Supreme Court denied Gasteria's contentions and followed the Prentiss case, supra, including the holding that the section related to damages arising out of an accident.

A case bearing on this provision of a similar statute of the State of Maryland has only recently (April 19, 1961) been decided by the U. S. District Court—Maryland. *Harold Weisberg et ux. v United States of America,* 193 F. Supp. 815 (Federal Supplement Advance Reports, July 10, 1961). The Court distinguishes between damage to property which would constitute a taking under the Causby case and damage under this section due to an accident or negligent operation of helicopters.

The County never sought to evade its liability under authority of the section of the Pennsylvania statute suggested by the Pennsylvania Supreme Court, and we have no doubt that counsel for the County were as surprised as we were that the Majority Opinion suggested this "way out" for the County. Throughout the litigation in the state courts, both in the equity cases and these condemnation proceedings, the County's position has invariably been that the low flights are lawful and within the navigable air space and immunized by Act of Congress; that it does not control the aircraft; that every flight has been in accordance with regulations and in airspace through which Congress said there is an absolute freedom of transit; that the County constructed the airport in accordance with plans approved by the Administrator of the Civil Aeronautics Authority and therefore the County is not liable. This is substantially the same argument that was made by the government in the Causby case.

Since the Pennsylvania Supreme Court has suggested no other remedy, and as airlines do not have the power of condemnation, the only possible procedure by the petitioner to protect his rights would be in the nature

of trespass action against the individual airlines for damages and/or injunctive relief from the repeated trespasses over his property.

B. It is Impossible to Determine and Allocate Damages Among the Airlines in Trespass Actions.

Even though the section of the Aeronautical Code suggested by the Pennsylvania Supreme Court would not be applicable as discussed above, in any form of trespass or tort action against the airlines it would be impossible as a practical matter to fix the individual liability of the respective airlines for the damages sustained by the petitioner caused by the low flights over his property.

In order to illustrate the practical impossibility of such proof we have included in the Record before your Honorable Court several pages of the petitioner's testimony before the Board of Viewers in which he relates instances of the low flights as observed by him. (R. 18 et seq) This testimony makes clear the insuperable difficulty of ascertaining and apportioning the damages among the aircraft, commercial or otherwise, using the glide path over his property. While he was able to identify some of the planes, he could not name all and certainly none which passed over his home at night and which disturbed its occupants. The testimony before the Board of Viewers disclosed that as of June 1, 1952, there were in excess of two hundred scheduled commercial flights in and out of the Greater Pittsburgh Airport; it is not conceivable that a property owner would be able to name or even make a sensible guess at the number and owners of planes flying low over his property on any particular day that the Northeast runway was in use.

We have also included another part of the Record before the Board of Viewers in which it is disclosed that there is no permanent record kept of the flights in and out of the airport, such records being on tape and destroyed at the end of thirty days. And, furthermore, *no record is kept or maintained at any time to show the specific runway or glide path used by the planes to land at and take off from the airport.* (R. 28)

The article in the *Harvard Law Review* for June, 1961, supra, at page 1586, has this to say with respect to the problem:

> ". . . It therefore seems improper to hold any single plane owner liable for the full damages sustained by a landowner. Some apportionment of damages among the various users is necessary so that the individual liability of each will reflect his proportionate contribution to the total harm. Yet it would be virtually impossible for any landowner to prove the extent to which each owner's planes cause noise interference. He would have to sue numerous defendants, each of whom would presumably attempt to shift liability to the others. *The consequence is likely to be protracted litigation in which the landowner fails to recover.*" (Emphasis added)

Mr. Justice Bell's Dissenting Opinion vigorously points out the impossibility of proving damages against any of the airlines or others in this manner:

> "The majority opinion clearly implies that the injury or taking was by the Airlines. While this is irrelevant in the present case since the Airlines are not parties hereto, I believe that under the facts herein this position is legally unsound and realistically im-

possible. None of the companies which fly the airlines nor the pilots are clothed with the power of eminent domain. They follow implicitly the law, the regulations and the orders of the Government of the United States or one of its agencies. They are, figuratively speaking, impotent slaves of the Federal Aviation Agency on their flights, their take-offs, their paths of glide and descent paths, and their landings. Moreover, it would be realistically impossible for a property owner to prove which Airlines damaged his property and to what extent each damaged his property. It would require a property owner to sit day and night outside his home or building for weeks or months to determine which Airline did what, and to allocate the damage and the blame, and exactly what moment of the day, week, month, or year it occurred. . . ."

It is clear that the petitioner should not be placed in the position where he must futilely attempt to enforce a claim against the Airlines for compensation for the diminution in the value of his property caused by the low flights over it and therefore it is equally clear that he has been deprived of his property without due process of law.

III.

The Decision of the Supreme Court of Pennsylvania Is in Conflict With the Commerce Clause and the Federal Statutes Covering Air Commerce in That It Would Penalize and Restrain the Airlines Notwithstanding Their Planes Land at and Take Off From the Airport in Strict Conformity to the Regulations and Under the Directions of the Responsible Federal Agency.

The damages to petitioner's property are caused by the repeated low flights of aircraft over his property in landing at and departing from this airport. Under the rationale of the Supreme Court of Pennsylvania in this case, those low flights are considered to be trespasses for which petitioner is entitled to relief from the airlines. Not being able to determine the damages caused by any particular flight or airline and apportion them, the only remedy available to the landowner would be to apply for injunctive relief against all owners of aircraft flying in and out of the airport.

Since the damages are caused by the normal and prescribed flights of planes, and not as a result of accident or negligent operation, the question would naturally arise as to whether the granting of injunctive relief by a state court, thus restraining the operation of planes in and out of the airport, would in effect be an attempt to regulate air commerce and be in conflict with the federal acts dealing with air commerce.

It would undoubtedly be contended that such action by a state court would be analogous to the attempt by the Village of Cedarhurst, New Jersey, to control the

height of planes flying over the Village in landing at and departing from the Idlewild Airport. (*Allegheny Airlines v. Village of Cedarhurst,* 132 F. Supp. 871). The Village adopted an ordinance which purported to make it unlawful for any person to operate an aircraft at an altitude of less than 1000 feet over the Village and imposed a penalty of $100 for each violation of its prohibitions. Suit was brought in the United States District Court for the Eastern District of New York by the airlines using the Idlewild Airport, Airlines Pilots Association and individual pilots to declare the ordinance unconstitutional and to enjoin the Village from the enforcement of its ordinance.

The trial court held that under the Commerce Clause, Article 1, section 8, clause 3 of the Constitution, Congress had power to regulate the flight of aircraft in interstate and foreign commerce, that this power was exercised by the Air Commerce Act of 1926, 49 U.S.C.A. § 171 et seq., the Civil Aeronautics Act of 1938, 49 U.S.C.A. § 401 et seq.,* and the Regulations of the Civil Aeronautics Board and the Administration of Civil Aeronautics, that thereby the federal government preempted the field of air traffic regulation, and that the ordinance, which plainly conflicts with the federal statutes and regulations, was invalid. The decision was affirmed by the Court of Appeals in *Allegheny Airlines v. Village of Cedarhurst,* 238 F.2d 812. So far as property damage is concerned, both decisions recognized the rule in the Causby case but held that the facts did not war-

* The provisions of these acts are now reenacted in the Federal Aviation Act, August 23, 1958, 72 Stat. 737, 49 U.S.C.A. 1301 et seq.

rant the application of the Causby doctrine to landowners in the Village who were parties to the litigation.

In the Cedarhurst case the flights of aircraft did not operate continually over the Village; the flights varied from 450 feet to 1500 feet, most of them being in excess of 1000 feet. In the case at bar the flights varied from 30 to 300 feet and are regular and frequent.

Any action brought in a state court under the theory of the Pennsylvania Supreme Court, whether for damages or for injunctive relief, would necessarily be on the allegation that the low flights were unlawful trespasses. The anomaly would be that those low flights even though not within the safe navigable airspace are made necessary in order to land at or take off from the airport, that they are made in compliance with the requirements and under the direction of the Civil Aeronautics Board and are necessary in order to accomplish the purpose of the federal acts to promote air commerce.

The *Harvard Law Review* for June, 1961, supra, has this to say at page 1587 on that subject:

> ". . . Once the airport has been constructed, federal regulations—and federally operated control towers at most commercial airports—require planes to fly particular approach patterns and altitudes. *Any deviation from these prescribed modes of operation,* even in an effort to reduce noise disturbance, *would be unlawful and would jeopardize flight safety.*" (Emphasis added)

That Congress intended to preempt the field of air traffic regulation is succinctly set forth in the opinion of Mr. Justice Jackson in *Northwest Airlines v. Minnesota,* 322 U.S. 292 (1944), where he stated at page 303:

> "Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government."

The Pennsylvania Legislature has recognized the supremacy of the federal government in the field of air commerce by specifically subordinating its powers to that of the federal government. We have included in Appendix B certain of the provisions of the Aeronautical Code, Act of 1933, P.L. 1001, 2 P. S. § 1460 et seq., which direct the Pennsylvania Aeronautical Commission to adopt rules not in conflict with airspace reservations established by the federal government, that all rules and regulations shall be consistent with and conform to the then current federal legislation governing aeronautics and the regulations promulgated thereunder and rules issued from time to time pursuant thereto. Certain other sections require that aircraft operating in Pennsylvania meet federal requirements.

It is undoubted that a state may not adopt legislation in conflict with the federal air commerce acts. The

question here is, does the decision of the Supreme Court of Pennsylvania conflict with those acts by allowing damages against airlines and pilots, or restraining the operation of planes, when in fact the planes are operating in strict compliance with the rules and regulations of the federal body which has exclusive jurisdiction over their operations?

Should actions be brought against the airlines for damages and/or injunctive relief, not only would they be opposed by the airlines on the ground that the low flights are privileged, but it is certain that the Civil Aeronautics Board and the Federal Aviation Agency (as in *Allegheny Airlines v. Village of Cedarhurst,* supra) would intervene on the basis that the awarding of damages against the airlines or the granting of injunctive relief restraining the low flights would be in violation of the air commerce acts and an unlawful interference with interstate commerce. Furthermore, it is assumed the County would likewise seek to intervene in order to protect the flow of air traffic in and out of the airport.

It is almost certain that a Pennsylvania trial court would not grant injunctive relief in view of that opposition, and the landowners would be left with no remedy.

Improper planning of a public airport should not require any citizen to resort to injunctions in order to protect his rights. Such procedure places a citizen unfairly into conflict with the municipality, the federal agencies, interstate commerce and the public.

CONCLUSION

The decision of the Pennsylvania Supreme Court under the facts in this case is repugnant to the commerce clause, the Fifth Amendment and the due process clause of the Constitution of the United States, to Article 16, Section 8 of the Constitution of the Commonwealth of Pennsylvania and is in conflict with the air commerce acts of the United States. The respondent, as owner and operator of the Greater Pittsburgh Airport, appropriated without due process of law an easement in the airspace above petitioner's property and is liable for the damages sustained under the doctrine of *United States v. Causby,* 328 U.S. 256. The judgment of the Supreme Court of Pennsylvania is, therefore, erroneous and should be reversed.

Respectfully submitted,

WILLIAM A. BLAIR
DAVID B. FAWCETT
D. MALCOLM ANDERSON
Attorneys for Petitioner

APPENDIX A

Federal Constitutional and Statutory Provisions Involved

Article 1, Section 8, Clause 3

The Congress shall have power * * * to regulate commerce with foreign nations, and among several states * * *

Fifth Amendment—Just Compensation

* * * nor shall private property be taken for public use, without just compensation, U.S.C. Const. Amdt. 5.

Fourteenth Admendment—Due Process Clause

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * * U.S.C. Const. Amdt. 14.

STATUTORY PROVISIONS*

Navigable Airspace

"As used in sections 171, 174-177, and 179-184 of this title, the term 'navigable airspace' means airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority, and such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation in conformity with the requirements of said sections. May 20, 1926, c. 344, Section 10, 44 Stat. 574; June 23, 1938, c. 601, Section 1107 (i) (1), (8), 52 Stat. 1028." 49 U.S.C. 180.

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*The provisions of these acts are now reenacted in the Federal Aviation Act, August 23, 1958, 72 Stat. 737, 49 U.S.C.A. 1301 et seq.

Appendix A.

General safety powers and duties of Board; delegation of authority to Administrator

"(a) The Board is empowered, and it shall be its duty to promote safety of flight in air commerce by prescribing and revising from time to time—

"... (7) Air traffic rules governing the flight of, and for the navigation, protection, and identification of, aircraft, including rules as to safe altitudes of flight and rules for the prevention of collisions between aircraft, and between aircraft and land or water vehicles." 49 U.S.C. 551 (a) (7).

AIR TRAFFIC RULES

Minimum safe altitudes

". . . 'Regulation 60.17. Minimum Safe Altitudes. *Except when necessary for take-off or landing* no person shall operate an aircraft below the following altitudes:

'(a) Anywhere. An altitude which will permit, in the event of the failure of a power unit, an emergency landing without undue hazard to persons or property on the surface;

'(b) Over congested areas. Over the congested areas of cities, towns or settlements, or over an open-air assembly of persons, an altitude of *1,000 feet* above the highest obstacle within a horizontal radius of 2,000 feet from the aircraft . . .

'(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In such event, the aircraft shall not be operated closer than 500 feet to any person, vessel, vehicle, or structure. . . .'" 14 C.F.R. Part 60, Section 60.17

APPENDIX B

Pennsylvania Constitutional and Statutory Provisions Involved

PENNSYLVANIA CONSTITUTION

"Sec. 8. *Property taken, injured or destroyed by private and municipal corporations*

Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction. The General Assembly is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporation or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall on the demand of either party be determined by a jury according to the course of the common law." Pennsylvania Const. Article 16, Section 8.

"THE AERONAUTICAL CODE"
(1933, May 25, P. L. 1001)
2 P.S. 34

"§ 1463.1 *Commonwealth airways system*

"The Commonwealth airways system is hereby declared to consist of all air navigation facilities available for public use, now existing or hereafter established, whether publicly or privately owned, and whether natural or man-made, except those under the jurisdiction of the United States Government . . ."

Appendix B.

"§ *1464 Aircraft construction, design, and airworthiness; federal licenses*

"The public safety requiring and the advantages of uniform regulation making it desirable, in the interest of aeronautical progress, that aircraft operating within this Commonwealth should conform, with respect to design, construction, and airworthiness, to the standards prescribed by the United States Government with respect to navigation of civil aircraft subject to its jurisdiction, it shall be unlawful for any person or resident to operate or navigate any aircraft within this Commonwealth, unless such aircraft has an appropriate, effective license issued by the United States Government, and is registered by the United States Government: Provided, however, . . ."

"§ *1465. Qualifications for airman; federal licenses*

"The public safety requiring and advantages of uniform regulation making it desirable, in the interest of aeronautical progress, that a person or resident engaging within this Commonwealth in navigating or operating aircraft in any form of navigation, or while in charge of the inspecting, overhauling or repairing of aircraft, or the repairing, packing and maintenance of parachutes, shall have the qualifications necessary for obtaining and holding a license issued by the Department of Commerce of the United States, it shall be unlawful for any persons to operate or navigate, or inspect, overhaul or repair any aircraft, or repair, pack and maintain parachutes, in this Commonwealth, unless such person is the holder of an appropriate, effective license or permit issued by the United States Government: . . ."

"§ 1467. *Ownership of space*

"The ownership of the space over and above the lands and waters of this Commonwealth is declared to be vested in the owner of the surface beneath, but such ownership extends only so far as is necessary to the enjoyment of the use of the surface without interference, and is subject to the right of passage or flight of aircraft. Flight through the space over and above land or water, at a sufficient height, and without interference to the enjoyment and use of the land or water beneath, is not an actionable wrong, unless said flight results in actual damage to the land or water, or property thereon or therein, or use of the land or water beneath."

"§ 1468. *Lawfulness of flight*

"Flight in aircraft over the lands and waters of this Commonwealth is lawful, unless at such low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be dangerous or damaging to persons or property lawfully on the land or water beneath. The landing of an aircraft on the lands or waters of another without his consent is unlawful, except in the case of a forced or emergency landing. For damage caused by a forced or emergency landing, the owner, lessee, and operator of the aircraft shall be liable, as provided in section four hundred three."

"§1469. *Damage to persons and property on the ground*

"The owner and the pilot, or either of them, of every aircraft which is operated over the lands or waters

of this Commonwealth, shall be liable for injuries or damage to persons or property on or over the land or water beneath, caused by the ascent, descent, or flight of aircraft, or the dropping or falling of any object therefrom, in accordance with the rules of law applicable to torts on land in this Commonwealth.

"As used in this section, 'owner' shall include a person having full title to aircraft and operating it through servants, and shall also include a bona fide lessee or bailee of such aircraft, whether gratuitously or for hire; but 'owner' as used in this section, shall not include a bona fide bailor or lessor of such aircraft, whether gratuitously or for hire, or a mortgagee, conditional seller, trustee for creditors of such aircraft or other persons having a security title only, nor shall the owner of such aircraft be liable when the pilot thereof is in possession thereof as a result of theft or felonious conversion.

"The person in whose name an aircraft is registered with the United States Department of Commerce shall be prima facie the owner of such aircraft within the meaning of this section."

"PENNSYLVANIA AIRPORT ZONING ACT"

(1945, April 17, P. L. 237)

2 P.S. 46

"§ 1561. Judicial review

". . . (5) In any case in which airport zoning regulations adopted under this act, although generally reasonable, are held by a court to interfere with the use or enjoyment of a particular structure or parcel of land to such an extent, or to be so onerous in their application to such a structure or parcel of land, as to constitute a

taking or deprivation of that property in violation of the Constitution of this State, or the Constitution of the United States, such holding shall not affect the application of such regulations to other structures and parcels of land."

"§ 1563 Acquisition of air rights

"In any case in which (1) it is desired to remove, lower or otherwise terminate a nonconforming structure, or use, or (2) the approach protection necessary cannot, because of constitutional limitations, be provided by airport zoning regulations under this act or (3) it appears advisable that the necessary approach protection be provided by acquisition of property rights, rather than by airport zoning regulations, the political subdivision within which the property or nonconforming use is located, or the political subdivision owning the airport, or served by it, may acquire by purchase, grant or condemnation, in the manner provided by the law, under which political subdivisions are authorized to acquire real property for public purposes, such air right avigation easement, or other estate or interest in the property or nonconforming structure, or use in question, as may be necessary to effectuate the purpose of this act. In the case of the purchase of any property, or any easement, or estate, or interest therein, or the acquisition of the same by the power of eminent domain, the political subdivision making such purchase or exercising such power shall, in addition to the damages for the taking, injury or destruction of property, also pay the cost of the removal and relocation of any structure or any public utility, which is required to be moved to a new location."